

***Protected Information to Be Disclosed Only in Accordance
With the U.S. Court of Federal Claims Protective Order***

**IN THE UNITED STATES COURT OF FEDERAL CLAIMS
*Bid Protest***

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|----------------------------------|---|-------------------------|
| PlanetSpace Inc., |) | |
| |) | |
| Plaintiff, |) | |
| |) | No. 09-476C |
| |) | Judge Block |
| v. |) | |
| |) | |
| United States of America, |) | FILED UNDER SEAL |
| |) | |
| Defendant, |) | |
| |) | |
| Space Exploration Technologies |) | |
| Corporation and Orbital Sciences |) | |
| Corporation, |) | |
| |) | |
| Defendant-Intervenors |) | |
| |) | |

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL PLEADING TO ADDRESS SPECIFIC
ISSUE RAISED BY THE COURT AT THE NOVEMBER 10, 2009 ORAL ARGUMENT**

PlanetSpace moves for leave to file this supplemental pleading to address one specific issue raised by the Court at the November 10, 2009 oral argument.

During oral argument, the Court raised questions regarding NASA FAR Supplement § 1809.106-1 and § 1809.106-70, and whether the agency violated these provisions by furnishing a copy of the Pre-Award Survey to the Source Selection Authority (“SSA”). NASA FAR Supplement § 1809.106-1 provides that Pre-Award Surveys are to be “used only to assist the contracting officer to make determinations of responsibility under FAR 9.104 . . . [and] [t]hey are *not* to be used to obtain information useful to proposal evaluation that does not directly relate to the responsibility determination” (emphasis added). NASA FAR Supplement § 1809.106-

70 further provides that “[i]nformation obtained during the survey will be treated in strict confidence and divulged only to those Government representatives having a need to know.”

The Court observed that on December 11, 2008, a copy of the Pre-Award Survey was emailed to the SSA by NASA’s Kathryn Lueders. AR 16683-84, 31045.79. In transmitting this document to the SSA, Ms. Lueders specifically informed the SSA that it would enable him “to get a feel for the performance risk of each of the potential providers.” AR 16683. Four days later, on December 15, 2008, the SEB made its final presentation to the SSA, in which it determined that PlanetSpace’s proposal was the second highest rated for Mission Suitability, and the second cheapest in terms of Price. AR 4470, 5035. However, on December 23, 2008, the SSA decided to reject the SEB’s evaluation of the proposals and instead award a contract to Orbital Sciences Corporation (“Orbital”), which submitted the lowest rated and most expensive proposal. In his Source Selection Statement, the SSA explained that he “believed there was a low likelihood PlanetSpace could successfully perform the contract.” AR 5181.

The Court raised the question whether these facts indicated a violation of NASA FAR Supplement § 1809.106-1 and/or § 1809.106-70. The Government responded that there is no indication in the administrative record that the SSA relied upon the Pre-Award Survey in making his source selection decision. PlanetSpace, however, pointed out that the sequence of events were such that one could reasonably infer that the Pre-Award Survey was part of the SSA’s selection decision, given that the SEB had endorsed the PlanetSpace bid, the cover e-mail transmitting the Pre-Award Survey explicitly noted that it would be useful in the SSA’s assessment of “performance risk,” and the SSA in his Source Selection Statement offered performance risk as a principal basis for his adverse award decision. AR 16683.

PlanetSpace files this motion to bring to the Court's attention another e-mail to the SSA that also relates to the Pre-Award Survey. On December 8, 2008, NASA's Alan Lindenmoyer sent an e-mail to the SSA in which he, albeit briefly, summarized the findings of the Pre-Award Survey with respect to purported flaws in the financing plan submitted by PlanetSpace. AR 20047. Mr. Lindenmoyer further explained that he was concerned that the SEB was not focusing on weaknesses in PlanetSpace's financing plan, but that he was relieved that the Pre-Award Survey team had identified some of these weaknesses. *Id.*

The SSA replied to Mr. Lindenmoyer the next day, indicating "I think I understand...." And, ultimately, PlanetSpace's financing became one of the bases for the SSA's decision, *see* AR 5177.

As noted *supra*, the NASA FAR Supplement strictly prohibited any utilization of the Pre-Award Survey except for making responsibility determinations. *See* NASA FAR Supplement §§ 1809.106-1, 1809.106-70. Accordingly, PlanetSpace submits that either: (a) the SSA was, as PlanetSpace has argued, making a responsibility determination, thus triggering the requirement of a referral to the Small Business Administration, or (b) the SSA was not making a responsibility determination, in which case NASA violated the NASA FAR Supplement prohibition against the SSA's reliance upon the Pre-Award Survey for purposes other than a responsibility determination.

In either case, the SSA decision was in violation of legal requirements, and a remand to NASA is required.

Respectfully submitted,

s/ Steven J. Rosenbaum

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